IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

S. JAIN for herself, and as parent of and for her son "A", a minor, Plaintiff, v. BUTLER ILLINOIS SCHOOL DISTRICT 53, THE BOARD OF EDUCATION OF THE BUTLER ILLINOIS SCHOOL DISTRICT 53, LOU PASKALIDES, in his official capacity, RAJIV ADVANI, in his official capacity, TODD RUSTENBERG, in his official capacity, HITESH PATEL, in his official capacity, ALAN HANZLIK, in his personal and official capacity, ALAN KUMAR, in his official capacity, HEIDI I. WENNSTROM, in her personal and official capacities, KELLY VOLIVA, in her persona and official capacities, LIBBY MASSEY, CAROLINE ROSELLI, and ATTORNEY DOE, Defendants.	)	Case No. 17-cv-00002 Judge: Ronald Guzman Magistrate Judge: Sidney I. Schenkier

DEFENDANTS MASSEY'S AND ROSELLI'S MOTION TO DISMISS PLAINTIFFS' VERIFIED FOURTH AMENDED COMPLAINT

Defendants, Libby Massey ("Massey") and Caroline Roselli ("Roselli"), by their attorneys, Matthew R. Henderson and Katherine G. Schnake, move this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiffs' Verified Fourth Amended Complaint against Massey and Roselli, and in support thereof, state as follows:

INTRODUCTION

Plaintiffs filed this Verified Fourth Amended Complaint against numerous defendants when S. Jain's son, Plaintiff A, was found to have engaged in academic dishonesty during the National GeoBee 2015-16 Contest ("GeoBee"), the 2015 Fountas & Pinnell ("F&P") Assessment, and the 2015 WordMaster Test ("WordMaster"). The Fourth Amended Complaint is attached as Exhibit A. Plaintiff A was subsequently barred from participating in academic contests for three years, however, he was allowed to continue attending his fifth grade English Language Arts ("ELA") class as well as all other extracurricular activities.

Counts VIII and IX of the Complaint are directed against Massey and Roselli, two lawyers retained by the District. Massey was retained by the District to perform an investigation into Plaintiff A's academic dishonestly and Roselli was retained by the District for legal advice on various matters as requested. While the Fourth Amended Complaint is confusing and disjointed, it appears that Plaintiffs have asserted § 1983 claims against Massey and Roselli arising out of the academic investigation and subsequent discipline of A. Plaintiffs also appear to have asserted claims for legal malpractice against Massey and Roselli. Finally, although unclear, Plaintiffs allege that Massey and Roselli participated in a civil conspiracy. (Ex. A, ¶89).

Specifically, Plaintiffs allege Massey denied Plaintiffs their rights under the School Board's Uniform Grievance Procedure, State Education Law and Due Process, and violated Rule 1.10(a) of the Illinois Rules of Professional Conduct regarding imputed conflicts of interest. (Ex. A, ¶87). Plaintiffs further claim Massey failed to report for possible child abuse. (Ex. A, ¶93). Plaintiffs claim that Roselli allegedly breached her duty to the School District and Plaintiffs by failing to investigate the conduct of the Superintendent, Principal and Assistant Principal. Plaintiffs claim that she further breached that duty by failing to report potential child abuse. As a direct and proximate result, Plaintiffs seek damages of $10 million dollars and unspecified punitive damages. (Ex. A, ¶¶95, 98).

Plaintiff's Fourth Amended Complaint is fatally flawed in many aspects. First, Plaintiffs' allegations against Roselli and Massey arise from purported state law violations. As such, those alleged violations cannot form the basis of federal constitutional violations. Second, Roselli and Massey did not act under color of law as a matter of law. Third, Plaintiffs' Due Process rights were not violated as they presented their version of events to Massey, the School Board and the District on multiple occasions. Fourth, Roselli and Massey are immune from liability through the doctrine of Qualified Immunity. Fifth, S. Jain cannot assert any of these claims on behalf of herself because she did not personally suffer an injury from a constitutional violation. Sixth, as agents of the District, Roselli and Massey cannot act as part of a conspiracy. Finally, Plaintiffs' purported claim for legal malpractice borders on the frivolous.

LEGAL STANDARDS

To survive a motion to dismiss, a complaint must assert a plausible claim. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). The purpose of a motion to dismiss is to test the sufficiency of a complaint, and all well-pleaded factual allegations should be accepted as true. *McCullah v. Gadert*, 344 F.3d 655, 657 (7th Cir. 2003). A complaint must contain sufficient factual matter that, if accepted as true, would "state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678. Although "detailed factual allegations" are not required, labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678.

In order to establish a violation of § 1983, a plaintiff must plead and prove that: (1) she had a constitutionally protected right; (2) she was deprived of this right in violation of the Constitution; (3) the defendants intentionally caused such deprivation; and (4) the defendants acted under color of state law. *McNabola v. Chicago Transit Authority*, 10 F.3d 501, 513 (7th Cir. 1993). Simply put, in order to prevail on a § 1983 claim, Plaintiff must establish that there was a constitutional violation which was committed by an individual acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Additionally, to recovery compensatory (as opposed to nominal) damages in a § 1983 action, the plaintiff must not only prove that a constitutional violation occurred, but also that the plaintiff suffered actual, compensable harm as a result. *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (holding in context of prisoner's suit which does not seek to invalidate criminal conviction, compensable damages cannot include "injury" of being convicted and imprisoned, unless that conviction has been overturned.)

ARGUMENT

I. State Law Violations are Not Constitutional Violations for Purposes of § 1983 Claims.

A § 1983 claim depends upon the existence of a violation of a constitutional right, so the threshold inquiry is whether the plaintiff can demonstrate that the defendant somehow deprived plaintiff of a constitutional right. *Graham v. Connor*, 490 U.S. 386, 393 (1989) (§ 1983 itself is not a source of substantive rights). Here, Plaintiffs' Due Process Claim is the only alleged violation of federal constitutional rights. Their Due Process claim, however, fails as a matter of law because complaint managers and resolution facilitators are not required to be "independent" or "impartial."

Plaintiffs allege that under the UGP, complaint managers, who are not employees of the School District, are supposed to provide assistance to the complainants in formulating their grievance and appoint a person to be an "independent and impartial" fact investigator for the School District and School Board. (Ex. A, ¶87, 89). Plaintiffs also allege that an "independent and impartial" resolution facilitator is appointed on behalf of the School District and Board is required to try to resolve the dispute on a consensual basis. (Ex. A, ¶87).

Plaintiffs claim that Roselli and Massey were not "independent and impartial" and, as such, their Due Process rights were violated. However, the UGP does not require a fact investigator or a resolution manager to be "independent and impartial." A copy of the School Board's Uniform Grievance Procedure is attached as Exhibit B.[1] The UGP makes no reference whatsoever to an "independent and impartial" fact investigator or an "independent and impartial" resolution manager. The allegations that Massey and Roselli were not independent or impartial, taken as true for purposes of this motion only, cannot possibly serve as a Due Process violation because the UGP did not impose such requirements. As such, there has been no Due Process violation as a matter of law.

The only remaining allegations, taken as true, are potential violations of *state* law, not federal constitutional rights. The alleged violates of state law claims are insufficient to state a § 1983. The Seventh Circuit, based on an unbroken line of Supreme Court precedent, expressly rejected a similar claim in which a plaintiff argued a defendant's alleged violation of a state law gave rise to a constitutional violation. In *Archie v. City of Racine*, 847 F.2d 1211, 1216–17 (7th Cir.1988) (en banc), cert. denied, 489 U.S. 1065 (1989), the court stated:

> [a] state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules. Indeed, 'it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.'

Id. at 1217.

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[1] A Rule 12(b)(6) motion "must be decided solely on the face of the complaint and any attachments that accompanied its filing." *Miller v. Herman*, 600 F.3d 726, 733 (7th Cir.2010). However, a court may also consider documents attached to a motion to dismiss, even if they were not attached to the complaint, "if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim." *Albany Bank & Trust Co. v. Exxon Mobil Corp.,* 310 F.3d 969, 971 (7th Cir.2002). Additionally, this a court may take judicial notice of documents in the public record. The School Board's Uniform Grievance Procedure is publically available on its website.

All of the allegations against Roselli and Massey are for purported state law violations. As such, there has been no conceivable constitutional violation and liability under § 1983 cannot be triggered.

II. Roselli and Massey did Not Act "Under Color of Law."

At the time of the underlying investigation, Roselli and Massey were two private attorneys employed by the Robbins Schwartz law firm. Section 1983 is not intended to regulate private conduct or to provide a cause of action against a "private actor." Instead, a § 1983 plaintiff must show that his or her constitutional injury was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). An act is committed under color of state law when it is "made possible only because the wrongdoer is clothed with the authority of state law." *Munoz v. Chicago School Reform Bd. of Bd. of Trustees*, 2000 WL 152138, *12-13 (*citing Hughes v. Meyer*, 880 F.2d 967, 971 (7th Cir. 1989)).

It is well established that "lawyers do not act under color of law merely by representing their clients." *Hefley v. Bruch*, 276 Fed. Appx. 506, 507 (7th Cir.2008). Here, neither Roselli nor Massey were acting under color of law given their respective roles in the underlying investigation. Roselli was retained by the District to advise the Superintendent during her initial investigation into A's academic dishonesty and assisted the Superintendent in drafting the summary of her findings. Roselli was not involved in the grievance investigation. A private attorney advising a client is not an action "under color of law" regardless of whether the client is a government entity or quasi-municipal entity organized by state legislatures such as the District.

Massey was appointed by the District to conduct the investigation on Defendant Hanzlik's behalf per the District's Uniform Grievance Procedure. (Ex. A, ¶53). Her sole role in this case was to investigate the grievance filed by S. Jain, draft a report on her findings, and give those findings to the Superintendent who would subsequently make a determination on whether there was academic dishonesty. Conducting an investigation pursuant to a client's instruction is not "acting under color of law."

Both Roselli and Massey undertook their respective roles in the underlying case through their private law practice, and there is no allegation that either one was a government employee. Although retained by the School District, the relationship between Roselli, Massey and the District was identical to that of any other lawyer and client. Neither of these roles can reasonably be described as "acting under color of law" as required by § 1983. As such, the claims against Roselli and Massey should be dismissed.

III. Plaintiff did not Suffer Due Process Violations as a Matter of Law.

The allegations in Plaintiff's complaint establish that S. Jain and her son, A, received ample procedural due process. Plaintiffs were given notice of the District's intent to suspend Plaintiff A from future academic contests. In response, S. Jain commented in writing and gave her versions of the facts on multiple occasions. Such an opportunity is sufficient due process and Plaintiffs cannot claim a constitutional violation as a matter of law.

Due process requires notice and an opportunity to respond. People "must be given some kind of notice and afforded some kind of hearing". *Goss v. Lopez*, 419 U.S. 565, 579, (1975). *See also Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); Henry J. Friendly, "Some Kind of Hearing," 123 U. Pa. L.Rev. 1267 (1975). Often an opportunity to comment in writing is all the hearing that is required. In fact, that is all the Due Process most litigants in court receive. Only a small percentage of civil suits reach a trial and are not necessary unless material facts are in dispute. The following hypothetical illustrates this point: should this Court grant the pending motions to dismiss in this case and the case is dismissed in its entirety with prejudice, surely the Plaintiffs could not allege that their Due Process rights had been violated simply because their case did not proceed to trial.

Plaintiffs reference their opportunities and decision to comment in writing on multiple occasions in their Fourth Amended Complaint:

- On January 20, 2016, Plaintiffs objected to and denied Defendant Wennstrom's findings. (Ex. A, ¶¶20, 33). A copy of the January 20, 2016 correspondence is attached as Exhibit C.
- On February 26, 2016, Plaintiffs filed their Appeal. (Ex. A, ¶30). A Copy of the February 26, 2016 letter requesting an appeal from the School Board's decision is attached as Exhibit D.[2]
- On May 17, 2016, Plaintiffs filed a "Motion to Reconsider." (Ex. A, ¶48). A copy of the May 17, 2016 letter seeking reconsideration of the School Board's decision is attached as Exhibit E.

All of these letters explain Plaintiffs version of the events in great detail.[3] The letters established that Plaintiffs were afforded an opportunity to present their version of events and took advantage of those opportunities. Disagreeing with the results does not constitute a Due Process violation.

Moreover, the Uniform Grievance Procedure does not create a right to a hearing before the School Board. The UGP specifically states,

> [t]his grievance procedure shall not be construed to create an independent right to a hearing before the Superintendent or Board.

(Ex. B).

Based on the plain language of the UGP and the Jain's letters to the District, Plaintiffs' Due Process Rights were not violated as a matter of law.

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[2] The January 30, 2016 letter and February 26, 2016 letter should be considered in ruling on the instant motion because it is referenced in the Fourth Amended Complaint and is central to Plaintiffs' claim that her Due Process rights were violated. *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 971 (7th Cir. 2002).

[3] Should this case proceed to discovery, the Jain's extensive communications with the District and Massey will further bolster this point.

IV. Alternatively, Roselli and Massey are Entitled to Qualified Immunity.

In the alternative, should this Court determine that Roselli and Massey acted under color of law, then they are entitled to Qualified Immunity. Qualified Immunity applies to governmental entities performing discretionary functions and shields them from "liability for civil damages, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982); *see also Filarsky v. Delia*, 566 U.S. 377 (2012). It is not just a defense to liability; rather, it is immunity from the lawsuit. The protection provided by Qualified Immunity applies regardless of whether the governmental official's error is considered a "mistake of fact" or "mistake of law." *Id.*

When Qualified Immunity is raised, a two-part inquiry is triggered. The first inquiry addresses whether a Plaintiff's complaint states a constitutional violation. The second examines whether the constitutional right was clearly established at the time of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 227 (2009). The sequence of those two inquiries is left to a court's "sound discretion." *Id.* If the answer to either inquiry is in the negative, the defendant is entitled to qualified immunity. *Zorzi v. County of Putnam*, 30 F.3d 885, 892 (7th Cir. 1994).

Neither prong has been satisfied in this case. As indicated above, all the allegations aimed at Roselli and Massey were for state law violations and, therefore, the complaint does not state a constitutional violation. Additionally, Plaintiffs have not establish that A's constitutional right was "clearly established" at the time.

Qualified Immunity has been extended to protect lawyers and law firms retained by government entities. Governments frequently retain private attorneys for the effective and efficient performance of core government functions. In fact, for smaller entities, it is the only practical way to obtain needed legal advice. In light of that reality, the Supreme Court has prohibited § 1983 actions against private lawyers arising out of circumstances similar to what occurred in this case.

In *Filarsky v. Delia*, 566 U.S. 377 (2012), Delia, a firefighter employed by the City of Rialto, California, missed work after becoming ill on the job. Suspicious of Delia's extended absence, the City hired a private investigation firm to conduct surveillance on him. When Delia was seen buying fiberglass insulation and other building supplies, the City initiated an internal affairs investigation. It hired Filarsky, a private attorney, to interview Delia. To verify Delia's claim, Filarsky asked Delia to allow a fire department official to enter his home and view the building materials to see whether or not they had been used. When Delia refused, Filarsky ordered him to bring the materials out of his home for the official to examine. After the interview concluded, officials followed Delia to his home, where he produced the materials.

Delia subsequently brought an action under 42 U.S.C. § 1983 against the City, the Fire Department, Filarsky, and other individuals. The District Court entered summary judgment on the basis of Qualified Immunity, and the Ninth Circuit Court of Appeals affirmed. The Supreme Court ruled that a private individual temporarily retained by the government to carry out its work is entitled to qualified immunity from suit under § 1983. *Filarsky* 566 U.S. at 390. In affording immunity not only to public employees but also to private attorneys retained by the City, the Supreme Court noted that its decision served to "ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." *Id.* at 390, citing *Richardson* 408 v. McKnight, 521 U.S. 390, 408 (1997).

The same result is warranted in this case. The School Board retained Roselli and Massey for their expertise in school law, student rights and student discipline. Much like the attorney in *Filarsky*, Ms. Massey was directed to conduct an investigation into A's academic dishonesty.

Their role was entirely discretionary and the School Board was entitled to retain a private attorney to efficiently and effectively investigate the grievance filed by Dr. Jain. Consistent with the Supreme Court's ruling in *Filarsky,* Roselli and Massey are therefore entitled to protection afforded by the doctrine of Qualified Immunity.

V. Constitutional Rights are Personal and Cannot be Vicariously Asserted.

Plaintiff brought the instant action "for herself, and as a parent of and for her son 'A,' a minor." However, the right to bring a § 1983 claim is personal in nature and does not accrue to a relative or parent. *See Russ v. Watts*, 414 F.3d 783, 790 (7th Cir. 2005); *Estate of Johnson by Castle v. Libertyville*, 819 F.2d 174, 178 (7th Cir. 1987) (both holding that parents cannot recover for constitutional injuries inflicted on their children and only for constitutional injuries that they themselves suffered). To the extent that the instant case is brought by anyone other than A, the case should be dismissed.

VI. As agents, Roselli and Massey cannot be part of a Civil Conspiracy.

Plaintiffs allege that Massey's and Roselli's actions were undertaken as part of a conspiracy with their clients to produce a Report that supported Plaintiff A's wrongdoings and ignored the purported violations committed by certain School Officials. (Ex. A, ¶89). No facts have been pled, however, (and none exist) that would entitle Plaintiffs to relief against Massey and Roselli for conspiracy. The elements of a civil conspiracy claim are: (1) an agreement between two or more persons; (2) to participate in either an unlawful act or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties; and (4) an overt act done pursuant to and in furtherance of the common scheme. *Canel and Hale, Ltd. v. Tobin,* 304 Ill. App. 3d 906, 920 (1st Dist. 1999). The mere characterization of a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss. *Id.*

Even if Plaintiffs had pled facts that would establish a conspiracy claim, agency law would preclude a civil conspiracy claim against Massey and Roselli. Lawyers are agents of their clients. Acts of an agent are considered acts of its principal, thus there can be no conspiracy between an agent and principal. *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill.App.3d 156, 168 (1st Dist. 2003). Therefore, regardless of what allegations Plaintiffs make, a civil conspiracy claim can never be legally sufficient against a law firm acting as an agent for its client. It follows that any allegations of Massey's or Roselli's participation in a conspiracy should be dismissed.

VII. Plaintiffs Cannot Bring a Claim for Legal Malpractice Against Massey and Roselli.

The final claim against Massey and Roselli appears to be a claim for legal malpractice. (Ex. A, ¶98). This claim fails, however, because Massey and Roselli never represented Plaintiffs. A central tenet to a claim for legal malpractice is the existence of an attorney-client relationship. *Bay Group Health Care, LLC v. Ginsberg Jacobs, LLC*, 2017 WL 770984, *3 (N.D. Ill. 2017). The general rule is that an attorney is liable only to his client, not to third person, unless the "primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party." *Pelham v. Grieshemer*, 92 Ill. 2d 13, 19 (1982); *In re Estate of Powell*, 2014 IL 115997, ¶ 13.

Plaintiffs have not alleged, nor can they allege any set of facts that would create an attorney-client relationship between Massey and Roselli and the Jains. In fact, Plaintiffs specifically pled in their complaint that Roselli represented and provided counsel to the School Board and defendant Wennstrom. (Ex. A, ¶8). Plaintiffs likewise concede that they were told by defendant Hanzlik that Massey would investigate the fact "for the Board and as the Board's appointee." (Ex. A, ¶53).

Plaintiffs' claim for legal malpractice borders on the frivolous and should be dismissed.

WHEREFORE, the Defendants, Caroline Roselli and Libby Massey, pray that this Honorable Court grant their Motion to Dismiss Plaintiffs' Complaint and for such further relief that is equitable and just.

Respectfully submitted,

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